

Comments on Chapter 30 Water & Culture of the California Water Plan

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To: DWR CWP Comments

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Attachments: Comments re Legal Require~1.docx (27 KB)

Please find attached comments for consideration in Chapter 30 submitted on behalf of the Sacred Places Institute for Indigenous Peoples.

Feel free to contact me by email or phone if you have any questions or concerns.

Thank you and take care,

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Outline of Water and Culture RMS Chapter

Chapter 30. Water and Culture –

Cultural Considerations and Water Management in California

Engaging with Tribes and tribal community leaders early on regarding water resource management is the best way to ensure local, state, federal, and international legal obligations to Tribes are met. Communicating early on so that Tribes have an opportunity to make informed decisions and proper consultation with Tribes in California around water issues are critical for several reasons.

First, water is an essential component of tribal cultures throughout California, the country, and the world.

We know water as essential to Life; crucial for bio-cultural diversity and for sustaining all aspects of Indigenous Peoples' survival and well-being, assuring our physical health, nurturing us spiritually, and central for the vitality of our cultures and traditional livelihoods. We recognize Water is the most vulnerable element of all forms of Life in light of climate change and its impacts, and coupled with the encroachment of invasive development leading to terricide – damaging homelands and ecosystems, and aquacide – the killing of the waters. We must take action now as some places are flooded and others stricken with drought. We urgently reiterate the critical significance of protecting all Water sources and Indigenous Peoples' full, unencumbered access to clean Water on our territories for physical, cultural and spiritual sustenance, and advance these recommendations.¹

Second, there are hundreds of federally recognized and non-recognized Tribes in California. Many of those federally recognized Tribes have not adjudicated their water rights. Sound water management practices should therefore make early consultation with Tribes a priority.

Water rights in California have a long and complicated history. The interplay between state water law and tribal water rights is especially complex in California for several reasons. First, while other western states operate under a prior appropriation system, California maintains a system

¹ Collective Statement on Agenda Item 3-Special Theme: Indigenous Peoples Development with Culture and Identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, submitted by Seventh Generation Fund for Indian Development on [DATE]

of both property-based rights and prior appropriation rights. Second, over 100 federally-recognized Indian tribes are located in California – by far, more tribes than in any other state. As discussed herein, a tribe's individual history plays an important role in defining their water rights, thus requiring a review of each tribe's history in order to accurately quantify each tribe's rights. No historical reviews have been completed for the majority of California Indian tribes. Third, California contains over 300 individual Indian allotments, located both on reservations and in the public domain. Each of these requires its own historical review, but to date there have been nearly zero reviews of individual allotments.²

If agencies do not prioritize such consultation, long-term water management strategies and plans may suffer in the long run as adjudicated tribal water rights could impact the existing watershed management landscape.

Agencies should also prioritize early engagement with Tribes in order to avoid any violations of state, federal, and international laws regarding the doctrines of government-to-government consultation and free, prior and informed consent (FPIC) respectively.

Any water project that requires a federal permit or federal funds would trigger Section 106 of NHPA, which requires agencies to engage in a good faith effort to consult with Tribes on a government-to-government basis. Additionally, in March of 2013, the Advisory Council on Historic Preservation (ACHP) released a statement on the intersections and common issues of Section 106 of NHPA and Article 18 of the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) and iterated its intent to apply DRIP principles when possible.³ Therefore, an argument can now be made for the case that any project triggering Section 106 review process also triggers FPIC under UNDRIP.⁴

² Delia Parr and Jedd Parr, California Indian Legal Services, California Tribal Water Rights Briefing Paper, 2009 California Tribal Water Summit.

³ Advisory Council on Historic Preservation, Section 106 and the U.N. Declaration on the Rights of Indigenous Peoples: Intersections and Common Issues: Article 18 and Section 106, November 22, 2013. Available at <http://www.achp.gov/docs/UNDeclaration106.pdf>.

⁴ See also, United Nations Declaration on the Rights of Indigenous Peoples, available at

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Article 25 recognizes the right of indigenous peoples to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources." Article 26.1 "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Article 26.2 "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." Article 26.3: "States shall give legal recognition and protection to these lands, territories and resources.

For example, any water project that would need a permit under Section 404 of the Clean Water Act would require consultation with Tribes, Tribal Historic Preservation Officers (THPOs) and/or the State Historic Preservation Officer (SHPO) as part of the cultural resources investigation and in order to fulfill agency obligations under Section 106 of the National Historic Preservation Act and Executive Orders 13175 and 12898.⁵ If a prehistoric Indigenous water conveyance system were uncovered during the course of the project, even if the condition of the system were poor, it would likely be eligible for listing on the National Register and would therefore require consultation with the Tribe or Tribes with ancestral ties to the area in question.⁶

Or for example, a project falling within the Coastal Zone could trigger both Section 106 of NHPA and Section 30244 of the California Coastal Act if the area in question was known to retain cultural or spiritual significance for a Tribe or Tribes and contained an archaeological site listed on, or eligible for listing on, the National Register of Historic Places.⁷

Such recognition shall be conducted with due respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned,”

and see also, Heather Whiteman Runs Him, Emerging Approaches to Asserting and Protecting Tribal Water Rights, April 24, 2013, available at <http://www.waterplan.water.ca.gov/docs/tws/2013/TWS-Day1/5-LegalRealitiesforTribalWaterRights.2.pdf>

⁵ EO 13175: Consultation and Coordination with Indian Tribal Governments, EO 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Section 6-606 Native American Programs. For additional information see White House Indian Affairs Executive Working Group, List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance, January 2009, available at [http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version 6-09.pdf](http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version%206-09.pdf). See also, U.S. Army Corps of Engineers, Los Angeles District, Cultural Resources Agency Consultation, Section 106 of the National Historic Preservation Act, available at <http://www.spl.usace.army.mil/Missions/Regulatory/PermitProcess/Section106.aspx>

⁶ See Water Conveyance Systems in California: Historic Context Development and Evaluation Procedures, Prepared by JRP Historical Consulting Services and California Department of Transportation, December 2010.

Because prehistoric water conveyance systems are rare, poorly understood, and constitute the oldest examples built in California, extant examples are likely to be found eligible for the National Register. However, the integrity of such properties will influence the level of significance and range of applicable criteria. Most prehistoric water conveyance systems are likely to retain some significance regarding their ability to address important questions about prehistory (Criterion D). Details derived from the study of such systems may address important topics such as how these vernacular structures were designed, variability in those designs, their evolution and emergence, the scope and intensity of agriculture among particular indigenous groups, and what types of crops were grown, to name a few. The best preserved prehistoric irrigation systems may also be found eligible as vernacular constructions pursuant to Criterion C, particularly in cases where relict vegetation contributes to the appreciation of the system as a cultural landscape. For example, wild hyacinths continue to prosper in some areas previously subjected to irrigation by the Owens Valley Paiute.

⁷ See above for discussion of NHPA. Section 30244 of the California Coastal Act “Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.” Available at <http://www.coastal.ca.gov/fedcd/cach3.pdf>

Or the discovery of human remains or proposal to develop a known cultural site could trigger the Native American Graves Protection and Repatriation Act or various state laws.

Please see the accompanying Reference Guide for a complete listing of state, federal, and international laws, policies and procedures relevant to the CA Water Plan.